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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978

No. 78-1472

DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency,

Petitioner,

v.

PACIFIC LEGAL FOUNDATION; JOHN B. KILROY, SR.; THE CITY OF TORRANCE; and THE CITY OF LOS ANGELES,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE CITY OF LOS ANGELES

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BRIEF IN OPPOSITION FOR RESPONDENT THE CITY OF LOS ANGELES

STATEMENT

Respondent City of Los Angeles ("City" hereinafter) accepts the statement of facts set forth in the petition filed herein, as corrected and supplemented by the opposition brief filed by respondents Pacific Legal Foundation and John B. Kilroy, Sr., but submits the following corrections and additions

of its own.

A. Permitting History of the Hyperion Treatment Plant Outfalls

Altogether, discharges from the outfalls extending into the ocean from the City's Hyperion Treatment Plant have been regulated by nine discharge permits issued over approximately the past five years: five issued by the California Regional Water Quality Control Board, Los Angeles Region ("CRWQCB" hereinafter) acting alone but without rejection of such issuance by the United States Environmental Protection Agency ("EPA" hereinafter); one, the action in question, by the EPA acting alone; and three by the CRWQCB and the EPA acting jointly.

1. CRWQCB Order No. 74-329, EPA NPDES Permit No. CA 0109991 1/ (effective 12-18-74) 2/

1/ The EPA regulates the Hyperion discharges by means of National Pollutant Discharge Elimination System ("NPDES") "permits" whereas the CRWQCB regulates through "orders." The EPA has chosen to regard its permitting activities at Hyperion as involving a single permit, to which the City

This jointly issued permit was the first and dealt exclusively with the five-mile (treated effluent) and one-mile (emergency) outfalls. The seven-mile sludge outfall was not regulated. 74-329 contained an expiration date of June 1, 1977.

2. CRWQCB Order No. 75-100, NPDES Permit No. CA 0109991 (effective 9-17-75) 3/

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takes exception, and has ascribed but one number to such permit, CA 0109991. Conversely, each CRWQCB order is apparently regarded as having a separate identity as each has its own number. For convenience of expression, all such actions regarding the Hyperion outfalls will be referred to hereinafter as permits.

2/ A certified copy of this permit was Exhibit 1 to the City's opening brief below and was part of the augmented record below.

3/ This permit is item number 1 in the Administrative Record certified to the court below by the EPA ("AR" hereinafter).

This jointly issued permit rescinded 74-329 and regulated all three outfalls. 75-100 introduced a three-phase sludge-out schedule, each phase providing for the discontinuance of one-third of the sludge discharge. The deadline for the completion of each phase was stated in terms of months after the date of "concept approval." Thus, the sludge discharge was to end altogether with the completion of the third phase within "30 months from date of concep. approval." AR 16. 75-100 contained an expiration date of February 1, 1977.

3. CRWQCB Order No. 75-165 (effective 12-1-75) 4/

This permit, issued by the CRWQCB alone and without veto by the EPA, recited that 75-100 and the NPDES permit contained a sludge-out schedule "related" to concept approval, that concept approval was given on October 1, 1975,5/ and

4/ A certified copy of this permit was Exhibit 2 to the City's opening brief in the court below.

5/ Conditional concept approval was given by the State on such date.

that the EPA was "administratively modifying" the NPDES permit to "substitute definite dates in the time schedule for compliance with the sludge discharge prohibition." Based on the date of concept approval, 75-165 supplied the dates for the three phases of the sludge-out schedule which in 75-100 had been keyed to months after concept approval. The date for completion of the third phase was given as April 1, 1978. 75-100 was otherwise left unchanged.

4. CRWQCB Order No. 76-80 (effective 5-24-76) 6/

This permit, issued by the CRWQCB alone and without veto by the EPA, changed the sludge-out schedule from three phases to four over a longer period. The date for complete sludge-out, for example, was extended from April 1, 1978 to April 1, 1980. The City does not concede that concept approval was then or at any other time given by the EPA.

6/ A certified copy of this permit was Exhibit 3 to the City's opening brief in the court below.

5. CRWQCB Order No. 76-202 (effective 11-22-76) 7/

This permit, issued by the CRWQCB alone and without veto by the EPA, amended 76-80 to adjust deadlines for the submission of certain plans and specifications and the award of certain contracts. 76-80 was left intact in all other respects.

6. CRWQCB Order No. 77-1, NPDES Permit No. CA 0109991 (effective 1-24-77 [CRWQCB], 2-23-77 [EPA]) 8/

This jointly issued permit expressly found that the CRWQCB adopted 75-165, 76-80, and 76-202 "amending the time schedules contained in Order No. 75-100." AR 120. 77-1 extended the expiration date of 75-100 from February 1, 1977 to June 30, 1977, 75-100 remaining effective in all other respects. AR 121.

7/ A certified copy of this permit was Exhibit 4 to the City's opening brief below.

8/ This permit is item number 7 in the AR.

7. CRWQCB Order No. 77-29 (effective 2-28-77) 9/

This permit, issued by the CRWQCB alone and without veto by the EPA, amended 76-80's sludge-out schedule by modifying a provision relating to trucks. 76-202 was rescinded. 76-80 was in all other respects left intact.

8. CRWQCB Order No. 77-84 (effective 6-2-77) 10/

This permit, issued by the CRWQCB alone and without veto by the EPA, found that 75-100 had been amended by 75-165 and 77-1 (making no reference to 76-80 and 76-202), and noted 75-100's expiration date of June 30, 1977. AR 145. 77-84 further found that the EPA was "administratively modifying the expiration date of the NPDES Permit to extend the permit to the full five-year statutory length as provided in the Federal Water Pollution Control

9/ A certified copy of this permit was Exhibit 5 to the City's opening brief in the court below.

10/ This permit is item number 16 in the AR.

Act and has requested that Order No. 75-100 be extended for the same period." Id. 77-84 provided that it was to "serve as part of" an NPDES permit in the absence of objections by the EPA Regional Administrator. AR 146. 77-84 rescinded 77-1, extended the expiration date of 75-100 to December 17, 1979, and left 75-100 intact in all other respects. Id.

The letter advising the City of the CRWQCB's proposed action, which became 77-84, stated that the CRWQCB "will consider extending the expiration date of Order No. 75-100 (NPDES Permit No. CA 0109991) to December 17, 1979," AR 133, and the attached tentative order was in all material respects identical to that adopted as 77-84. See AR 135-136.

9. NPDES Permit No. CA 0109991 (effective 6-2-77)

By a letter of June 2, 1977 11/ the EPA extended the expiration date of

11/ This letter is item number 15 in the AR.

NPDES Permit No. CA 0109991 from June 30, 1977 to December 17, 1979.

The City was advised of proposed modifications to NPDES Permit No. CA 0109991, which became the June 2, 1977 extension, by a letter of April 26, 1977, 12/ which letter did not describe the proposed modifications but enclosed a copy of the "public notice" relating thereto. AR 128. The public notice's 13/ sole description of the proposed modifications was that the "Regional Administrator proposes to extend the expiration date of the permit from June 30, 1977 to December 17, 1979. All other terms and conditions of the permit would remain unchanged." AR 130.

B. The EPA Enforcement Action

On August 12, 1977, less than two months after its most recent permitting action, the EPA caused an enforcement action to be filed in federal district

12/ This letter is item number 9 in the AR.

13/ This notice is item number 10 in the AR.

court 14/ under Clean Water Act section 309 [33 U.S.C. § 1319] which alleged, among other things, violation of NPDES Permit No. CA 0109991 by virtue of the City's alleged failure to meet certain deadlines in the three-phase sludge-out schedule of 75-100 and which sought civil penalties therefor and an injunction imposing the four-phase sludge out schedule of 76-80 but without reference to 76-80. The complaint filed in the case did not refer to the existence of any CRWQCB permitting action, although it did attach, as an exhibit, 75-100, a jointly issued permit.

14/ United States of America v. City of Los Angeles, et al., No. CV 77-3047-HP (C.D. Cal.) A certified copy of the complaint, sans exhibits, was filed with the court below as Exhibit A to the City's Memorandum in Reply to Motion for Clarification of Order.

REASONS FOR DENYING THE WRIT

A. Where Concurrent Permitting Jurisdiction Exists, the EPA Bears a Heavy Burden of Justifying a Decision Not to Hold a Hearing, which Burden was Not Borne by the EPA in this Case

1. Concurrent Jurisdiction was Required by the Court Below

In its petition for review the City sought to establish exclusive state jurisdiction over all three of the Hyperion outfalls, but also sought, alternatively, to establish exclusive federal jurisdiction in the absence of state jurisdiction. See City's opening brief in the court below, at 28-30. The court below ruled, however, that the EPA has jurisdiction over the five and seven-mile outfalls while the State of California has jurisdiction over the one-mile emergency outfall. 15/

15/ The court expressly avoided addressing the question of the extent to which or the circumstances under which the state would have jurisdiction over the five and seven-mile outfalls. Pacific Legal Foundation v. Costle, 586 F.2d 650, 657.

Pacific Legal Foundation v. Costle, 586 F.2d 650, 657. None of the parties before this Court now takes issue with this holding.

2. Coordination is Imperative

The court stated that joint action was the "most sensible way of dealing with the problems created by this splitting of jurisdiction," id., while recognizing the "problems involved in coordinated action." Id. The court cautioned that coordination was "imperative." Id. None of the parties before this Court now takes issue with this ruling.

In concluding that it could not find that an adjudicatory hearing prior to the June 2, 1977 extension would have served "absolutely no purpose", id., at 659, the court cited "special circumstances" in this case which cautioned against concluding that no dispute existed over material facts. Id. The court noted:

> "Among the special circumstances of this case is the division of jurisdiction over discharges in the ocean between the federal and state authorities which significantly complicates compliance by an affected agency. It becomes

> both possible and tempting for each authority to deny responsibility by attributing the command in question to the other. The ease with which this can be done increases as the opportunities for confrontation in a hearing setting diminish. Considerations such as these may properly influence our decision about whether a hearing in the situation before us would be useless." (Emphasis added.) Id.,at 659-660.

The record supports the observations of the court below. The EPA evidently believed that it was free to adopt those actions by the state authorities which served its purposes. Thus, in its enforcement action it adopted the state's granting of "concept approval" on October 1, 1975, so as to trigger the three-phase sludge out schedule of 75-100. Yet it chose to ignore almost entirely 16/ the four-phase sludge out schedule of 76-80 which modified 75-100's sludge-out deadlines (e.g., the date for total sludge-out was extended by two years). 76-80 was neither vetoed by the EPA,

16/ To be sure, 77-1, a joint permit, did refer to 76-80 as amending 75-100's time schedules.

which the EPA had the right to do under Clean Water Act section 402(d)(2) [33 U.S.C. § 1342(d)(2)], nor rescinded by a later permitting action.

3. A Hearing May Be Essential

If the objective of the June 2, 1977 extensions was to restore the three-phase sludge-out schedule of 75-100 (the enforcement action predicated on that schedule was filed shortly thereafter), this was not made clear by the notices given to the City. The letters from both the EPA and CRWQCB conveyed the sole message that NPDES Permit No. CA 0109991 and 75-100 would be extended to December 17, 1979. As noted by the court below, 586 F.2d at 660, the record is "barren of any explanation of the extension of June 2, 1977." Had a hearing been held, the intentions of the EPA and CRWQCB presumably would have been made clear to the City, something that the notices sent to the City failed to do. To this extent, the "opportunity for public hearing" mandated by Clean Water Act section 402(a)(1) [33 U.S.C.

§ 1342(a)(1)] is not meaningful with respect to the issuance of a discharge permit if the full ramifications of the proposed action are not explained to the intended permittee.

This Court's dictum in National Independent Coal Operators Association v. Kleppe, 423 U.S. 388, 398 (1976), interpreting a different statute's establishment of an "opportunity for a public hearing" as a prerequisite to the assessment of a civil penalty as creating only the right to request a hearing, may be distinguished on the ground that in that case the impact of the imposition of a civil penalty was clearer than that of the extension at issue herein. Underlying reasons aside, civil penalties may generally be perceived as being harsh, but not as being complicated. NPDES permits, however, can be extremely complicated and, judging from the record in this case, ambiguous and confusing as well.

This difference is ample cause to distinguish the National Coal Operators dictum and to place upon the EPA the

burden of justifying a decision not to conduct an adjudicatory hearing relative to a permit issuance. The confrontation inherent in such a hearing will not only bring to light differences over facts material to the proposed action, but will also foster coordination between the federal and state authorities.

B. Requiring the EPA to Justify not Holding a Hearing in Cases Involving Concurrent Jurisdiction will not be a Heavy Administrative Burden

So far as the City is aware, it is one of but two dischargers having outfalls extending both less than and more than three miles from shore. (The EPA is, of course, in a much better position to know whether this is so.) Hence, these outfalls may be the only ones subject to concurrent regulation. Therefore, requiring the EPA to justify a decision not to hold a hearing prior to the issuance of a permit where concurrent regulation is involved should not unduly affect the execution of its administrative responsibilities.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari does not raise issues of sufficient importance to warrant review of the decision below by this Court.

Respectfully submitted,

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